DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. JFC BUILDERS, INC. Respondent	Case Nos.: I-00-10608 I-00-10634

FINAL ORDER

I. Introduction

On May 2, 2001, the Government served a Notice of Infraction upon Respondent JFC Builders, Inc., alleging eight violations of various watershed protection rules.[1] The Notice of Infraction alleged that the violations occurred on April 10, 2001 at 934 Kearney Street, N.E., and sought a total fine of $1,700 for the various violations.

Respondent did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e), 2-1802.05). Accordingly, on May 31, 2001, this administrative court issued an order finding Respondent in default and subject to the statutory penalty of $1,700 required by D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). The Order also required the Government to serve a second Notice of Infraction.

[1] The Notice of Infraction alleged violations of 21 DCMR 502.1, 538.1(e), 538.1(f), 538.1(j), 539.4, 543.3, 539.1 and 539.3. The substantive requirements of each rule are discussed below.

The Government then served a second Notice of Infraction on June 15, 2001. Respondent also did not answer that Notice within twenty days of service. Accordingly, on August 20, 2001, a Final Notice of Default was issued, finding Respondent in default on the second Notice of Infraction and subject to total statutory penalties of $3400 pursuant to D.C. Official Code §§ 2-1801.04(a)(2)(B) and 2-1802.02(f). The Final Notice of Default also set September 12, 2001 as the date for an *ex parte* proof hearing, and afforded Respondent an opportunity to appear at that hearing to contest liability, fines, penalties or fees. Copies of both the first and second Notices of Infraction were attached to the Final Notice of Default. A subsequent order moved the hearing date to September 14, 2001.

On September 14, 2001, the Government, represented by Carlos Fields, the inspector who issued the Notices of Infraction, appeared for the hearing. There was no appearance for the Respondent. Based upon the testimony at the hearing, my evaluation of the credibility of the Government's witness and the entire record in this case, I now make the following findings of fact and conclusions of law.

II. Service

A. Findings of Fact

Mr. Fields inspected the premises at 934 Kearney Street, N.E. (the "Property") on April 10, 2001. At that address, he found a vacant house undergoing substantial renovation to both its interior and exterior. He met a worker at the site named Brian Kelly, who told him that Respondent JFC Builders, Inc., ("JFC") was the general contractor at the site and that John Casey was the owner of JFC. Mr. Casey then came onto the site and confirmed for Mr. Fields that he was the owner of JFC and that JFC was the general contractor for the project. He told

Mr. Fields that JFC's mailing address was P.O. Box 1107, Dunn Loring, VA 22027. Mr. Fields mailed both the first and the second Notice of Infraction to JFC at that address, but the Postal Service returned them with a notation that there was no such number. Petitioner's Exhibits ("PX") 110-111. Copies of the orders dated May 31 and August 20, 2001 were mailed to JFC at the same address and also were returned by the Postal Service with similar notations.

B. Conclusions of Law

Because the Postal Service returned the Notices of Infraction and the May 31 and August 20 orders, it is evident that JFC did not receive actual notice of the charges or of the hearing date. Was service nevertheless proper? The Civil Infractions Act, D.C. Official Code § 2-1802.05, permits service by mail "to the respondent's last known home or business address," and such service satisfies the constitutional requirement of due process. *Dusenbery v. United States*, 122 S. Ct. 694, 700-02 (2002); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983). The question presented is whether mailing the Notices of Infraction and the August 20 Order setting the hearing date to the address supplied by Mr. Casey satisfied applicable statutory and constitutional requirements. In a related context, the Court of Appeals has held that an address furnished to a government agency by a party may be regarded as that party's last known address. *Allen v. District of Columbia Dep't of Employment Servs.,* 578 A.2d 687, 691-92 (D.C. 1990) (interpreting the requirement of former D.C. Code § 46-112(b) (1981 ed.), now codified at D.C. Official Code § 51-111(b), that initial determination of an unemployment compensation claim be sent to a party's "last-known address"). Thus, it was proper to serve JFC at the address supplied by Mr. Casey, the company's owner. *DOH v. Oladele*, OAH No. I-00-10011 at 15-16 (Final Order, March 23, 2001) (Mailing Notice of Infraction to an address that Respondent voluntarily identified as his own is proper service.) A contrary ruling would encourage potential

respondents to supply false addresses to the Government in the hope of evading liability for violations of environmental protection standards and other important public health and safety measures. I conclude, therefore, that the address supplied by Mr. Casey was JFC's "last known business address" within the meaning of § 2-1802.05, and that service by mail upon JFC at that address was proper under the Civil Infractions Act.

This result is also consistent with the Due Process Clause of the Fifth Amendment. Due process is satisfied by giving "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950), and "notice mailed to [a party's] last known available address," satisfies that requirement. *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 798 (1983). Proof that a party has received actual notice of the charges and the hearing date is not necessary, as long as the method of service complies with the due process standard announced in *Mullane. See Dusenbery v. United States,* 122 S Ct. 694, 701 (2002) (notice mailed to last known address sufficient even if not actually received). Service to the address supplied by Mr. Casey, therefore, was permissible under the Due Process Clause.

III. The Infractions

A. 21 DCMR 502.1

1. Findings of Fact

The Notices of Infraction allege that JFC failed to obtain a building permit before engaging in land disturbing activity at the Property. When Mr. Fields arrived there on April 10,

he observed excavation activity around the foundation of the house, with a large pile of dirt placed in front of the Property next to the street. Mr. Casey told Mr. Fields that he had a permit authorizing the excavation and that he would meet Mr. Fields at the Property on April 11 to show him that permit. Mr. Fields returned to the Property on April 11, but Mr. Casey did not meet him as scheduled. Mr. Fields later checked the records of the Department of Consumer and Regulatory Affairs ("DCRA"), which issues building permits. He found a permit authorizing interior renovation of the Property, but no evidence that a permit had been issued for the excavation that he observed on April 10. This evidence is sufficient to demonstrate that no building permit had been issued for the excavation work.

2. Conclusions of Law

The rule at issue provides:

> No person may engage in any land disturbing activity on any property within the District until that person has secured a building permit from the District.
> Approval of a building permit shall be conditioned upon submission by the permit applicant of an erosion and sedimentation plan which has been reviewed and approved by the Department.

21 DCMR 502.1

Because "excavating" is expressly included within the definition of "land disturbing activity," 21 DCMR 599.1, JFC's activities at the Property required a building permit, and its failure to possess that permit violated § 502.1.

Violation of § 502.1 is a Class 2 civil infraction, punishable by a fine of $500 for a first offense and $1,000 for a second offense within a specified three-year period. 16 DCMR 3234.1(a); 16 DCMR 3201. The Government charged JFC as a second offender because Mr. Casey previously was held liable for violating § 502.1 on March 1, 2000 in *DOH v. Sheriff Mews, LLC*, OAH No. I-00-10124 at 6 (Final Order, September 8, 2000). Mr. Casey, however, is not a Respondent in this matter; only JFC has been named by the Government as the Respondent.[2] Because the Government offered no evidence that JFC has committed previous violations of § 502.1, JFC must be treated as a first offender, and a $500 fine will be imposed for its violation of § 502.1.

B. 21 DCMR 538.1(f)

1. Findings of Fact

The pile of excavated dirt that Mr. Fields observed at the Property on April 10 was uncovered and exposed to the elements, making it likely that rainwater would wash dirt from the Property.

[2] A corporation is a legal entity distinct from its owners, even if there is only one owner. *Cedric Kushner Promotions, Ltd., Inc. v. King*, 533 U.S. 158, 163 (2001); *United States v. Bestfoods*, 524 U.S 51, 61-62 (1998). Therefore, Mr. Casey's prior violation can not be attributed to JFC. JFC is legally distinct from Mr. Casey, and it was not charged in the prior case. Nor was the Government's mailing of the Notices of Infraction to JFC "c/o John Casey" sufficient to make Mr. Casey a Respondent in this matter. Sending the notices "in care of" Mr. Casey simply designated him as the person to receive them on JFC's behalf; it did not make him a Respondent along with JFC. For that to occur, the Notices of Infraction would have to unambiguously name both him and JFC as Respondents.

2. Conclusions of Law

The rule at issue provides that proper erosion and sediment control planning must include protecting stockpiled soil "with mulch or temporary vegetation." 21 DCMR 538.1(f). JFC violated that rule on April 10, because the soil that it stockpiled was unprotected with either mulch or temporary vegetation. Violation of § 538.1(f) is a Class 3 infraction, punishable by a fine of $100 for a first offense. 16 DCMR 3234.2(r); 16 DCMR 3201. I will impose a fine in that amount for JFC's § 538.1(f) violation.

C. 21 DCMR 538.1(j)

1. Findings of Fact

On April 10, Mr. Fields observed that a nearby storm sewer, to which runoff from the Property would flow, was not protected by a sediment trap. This meant that silt from the Property would be washed into the storm sewer when it rained.

2. Conclusions of Law

The rule at issue requires contractors to "[e]mploy sediment traps to protect inlets or storm sewers below silt-producing areas." 21 DCMR 538.1(j). Because silt from the Property flowed to the storm sewer, § 538.1(j) required JFC to place a sediment trap at the sewer. Its failure to do so violated the rule. Violation of § 538.1(j) is also a Class 3 Infraction, punishable by a $100 fine for a first offense. 16 DCMR 3234.2(v); 16 DCMR 3201. I will impose a fine in that amount for JFC's § 538.1(j) violation.

D. 21 DCMR 539.4

1. Findings of Fact

A silt fence had been constructed around the perimeter of the Property. On April 10, portions of that fence were torn and other portions had been knocked down. As a result, the silt fence could not provide adequate erosion control, because the sections that were torn or knocked down would not prevent the exposed soil from being washed or blown off the Property.

2. Conclusions of Law

The rule at issue provides: "Adequate erosion control measures shall be in place prior to and during the time of exposure." 21 DCMR 539.4. JFC violated this rule because its erosion control measure – a silt fence – was not capable of providing adequate erosion control on April 10, when the excavated soil was exposed to the elements. Violation of § 539.4 is also a Class 3 infraction, punishable by a $100 fine for a first offense and $200 for a second offense within a specified three-year period. 16 DCMR 3234.2(y); 16 DCMR 3201. As with the § 502.1 violation, the Government sought to fine JFC as a second offender based upon an alleged prior violation of § 539.4 by Mr. Casey. As noted above, however, any prior violations by Mr. Casey are not attributable to JFC on this record. JFC, therefore, must be treated as a first offender and will be fined $100 for its violation of § 539.4.

E. 21 DCMR 543.3

1. Findings of Fact

Mr. Casey did not have an erosion and sediment control plan at the Property on April 10, and Mr. Fields found no evidence of such a plan on file at DCRA. While there is no evidence showing the exact area of soil disturbance, photographs taken by Mr. Fields on April 10 show that the area of disturbance exceeded 50 square feet. PX 103-04. There is no evidence, however, of the total construction costs for the project.

2. Conclusions of Law

The rule at issue provides:

> Projects which do not meet the criteria for minor projects or which include razing activities shall be classified and processed as a [*sic*] Major Project. An erosion and sediment control plan shall be required for all major projects.

21 DCMR 543.3

Section 543.3, therefore, requires submission of an erosion and sediment control plan for every land disturbing project that does not meet the criteria for a minor project. Those criteria are set forth in 21 DCMR 543.1:

> A project shall be classified and processed as a Minor Project if it meets the following criteria:
>
> (a) Less than fifty square feet (50 $ft.^2$) of earth is disturbed; or

(b) The total construction cost does not exceed twenty-five hundred dollars ($2500).

The evidence shows that JFC disturbed more than 50 square feet of earth, but there is no evidence of the construction costs for the project, and, therefore, no basis for finding that those costs exceed $2,500. Consequently, I can not conclude that the excavation at the Property was a major project requiring an erosion and sediment control plan. The Government, therefore, has not proved that the absence of such a plan violates § 543.3. Accordingly, the § 543.3 charge must be dismissed. D.C. Official Code § 2-1802.03(c).

F. The Remaining Violations

The Notices of Infraction also charge Respondent with violating 21 DCMR 538.1(e), which requires contractors to limit grading to areas of workable size, 21 DCMR 539.1, which requires erosion and sediment control measures to be applied to erodible materials that are exposed by project activity, and 21 DCMR 539.3, which requires exposed areas to be protected within a minimum amount of time. The Notices of Infraction sought a $100 fine for the alleged violation of § 538.1(e), and separate $50 fines for the violations of §§ 539.1 and 539.3. At the hearing, the Government moved to dismiss these three charges with prejudice, either because they were duplicative of other charges or because there was insufficient evidence to sustain them, and I granted its motion.

IV. Penalty for JFC's Failure to Answer

The Civil Infractions Act, D.C. Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within

twenty days of the date of service by mail. If a party does not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). If a recipient fails to answer a second Notice of Infraction without good cause, the penalty doubles. D.C. Official Code §§ 2-1801.04(a)(2)(B) and 2-1802.02(f). Imposition of the statutory penalty is required, absent a showing of good cause, even if the underlying infraction is dismissed or a fine is not imposed. *DOH v. Washington General Contractors*, OAH No. I-00-10387 at 11 (Final Order, July 11, 2001); *DOH v. DRM & Associates*, OAH No. I-00-40309 at 14 (Final Order, January 23, 2002). ("The Council's purpose in enacting the penalty provisions of the Civil Infractions Act was to promote an efficient adjudication system by encouraging prompt responses to Notices of Infraction, regardless of whether any Respondent believes there is a valid defense to a charge. . . . Therefore, even though [Respondents] were . . . not found liable for the infractions charged, they nevertheless are liable for the statutory penalty[,] an amount equal to the total fines sought in the Notices of Infraction . . . ."); D.C. Official Code § 2-1801.04(2)(B) (Penalty is "twice the amount of the civil fine for the infraction *set forth in the notice*.") (Emphasis added.)

JFC has offered no evidence of its reasons for failing to answer the Notices of Infraction. Non-receipt of a Notice of Infraction may be good cause for a respondent's failure to answer, if a delivery error is not the respondent's fault. *See, e.g., DOH v. Weedon*, OAH No. I-02-72041 at (Final Order, June 27, 2002); *DOH v. Galeano's Trucking, Inc.*, OAH No. I-00-11097 at 5 (Final Order, April 22, 2002). JFC, however, can not rely upon that principle. Non-receipt of the Notices of Infraction was its own fault, as the Government relied on the erroneous address given by Mr. Casey to mail the Notices of Infraction. The holding in *DOH v. Oladele*, *supra*, OAH

No. I-00-10011, which involved another respondent in the construction business, is applicable here as well:

> [Construction] is a regulated business, requiring numerous permits and compliance with the building code, as well as with safety and environmental regulations. A person in such a business acts unreasonably in making it impossible for the Government to communicate with him by mail, and assumes the risk that important Government documents sent to mailing addresses that he has identified as his own will not reach him.

Id. at 15.

JFC, therefore, is liable for a statutory penalty equal to twice the amount of the fines sought by the Government in the Notices of Infraction.

V. Summary

The amounts of the fines and penalty owed by JFC are set forth below:

Charge	Fine Sought	Fine Imposed	Penalty Imposed
21 DCMR 502.1	$1,000	$500	$2,000
21 DCMR 538.1(f)	100	100	200
21 DCMR 538.1(j)	100	100	200
21 DCMR 539.4	200	100	400
21 DCMR 543.3	100	0	200

21 DCMR 538.1(e)	100	0	200
21 DCMR 539.1	50	0	100
21 DCMR 539.3	50	0	100
Totals	**$1700**	**$800**	**$3400**

Thus, JFC is liable for fines of $800 and a penalty of $3,400, a total of $4,200.

VI. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2002:

ORDERED, that Respondent shall pay a total of **FOUR THOUSAND TWO HUNDRED DOLLARS ($4,200)** in accordance with the attached instructions within twenty (20) calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent

pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondent's business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

FILED 07/30/02

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John P. Dean
Administrative Judge